

EXHIBIT 1

Deposition of 30(b)(6) Thomas Crary

Hempton v. Pond5, Inc., et al.

March 22, 2016



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Hempton v. Pond5, Inc., et al.

30(b)(6) Thomas Crary

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<p>UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE</p> <hr/> <p>GORDON HEMPTON,) Plaintiff,) -v-) CAUSE NO. 3:15-CV-05696-DWC POND5, INC., A Delaware) Corporation; and POND5 USER) CKENNEDY342, A corporation of) Individual of Type Unknown,) Defendants.)</p> <hr/> <p>DEPOSITION UPON ORAL EXAMINATION OF 30(b)(6) THOMAS CRARY</p> <hr/> <p>Taken at 1000 Second Avenue, Suite 3670 Seattle, Washington</p> <p>DATE TAKEN: March 22, 2016 REPORTED BY: Nancy M. Kottenstette, RPR, CCR 3377</p>	<p>1 INDEX OF EXAMINATION 2 PAGE 3 EXAMINATION 4 Questions By Mr. Townsend: 5 5 CROSS-EXAMINATION 6 Questions By Mr. Altenbrun: 142 7 REDIRECT EXAMINATION 8 Questions By Mr. Townsend: 147 9 10 11 INDEX OF EXHIBITS 12 NUM. DESCRIPTION PAGE 13 Exhibit 1 Notice of Deposition 12 14 Exhibit 2 Pond5 Org Chart 12 15 Exhibit 3 Pond5 Content License Agreement 14 16 Exhibit 4 Pond5 Contributor Agreement 19 17 Exhibit 5 Pond5 Terms of Use 20 18 Exhibit 6 Pond5 Content License Agreement 49 19 Exhibit 7 Correspondence between Wild 73 Audio Productions and Pond5 customer service most recently dated 5/5/14 20 21 Exhibit 8 Correspondence between Chris 74 Kennedy and Pond5 most recently dated July 3 22 23 Exhibit 9 E-mail chain between Mr. Hempton 81 and Mr. Crary most recently dated 10/16/15 24 25</p>
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<p>1 APPEARANCES 2 FOR THE PLAINTIFF: 3 Roger M. Townsend, Esq. 4 Cindy Heidelberg, Esq. 5 BRESKIN JOHNSON TOWNSEND 6 1000 Second Avenue 7 Suite 3670 8 Seattle, WA 98104 9 206.652.8660 10 rtownsend@bjtlegal.com 11 12 Nicholas Power, Esq. 13 LAW OFFICES OF NICHOLAS POWER 14 540 Guard Street 15 Suite 150 16 Friday Harbor, WA 98250 17 360.298.0464 18 nickedpower@gmail.com 19 20 FOR THE DEFENDANT: 21 POND5, INC., A DELAWARE CORPORATION 22 Larry E. Altenbrun, Esq. 23 NICOLL BLACK & FEIG 24 1325 Fourth Avenue 25 Suite 1650 Seattle, WA 98101 206.838.7555 laltenbrun@nicollblack.com ALSO PRESENT: Gordon Hempton</p>	<p>1 Exhibit 10 File sent to Mr. Hempton on 83 Information on Hassan Khan 2 3 Exhibit 11 E-mail chain between Hassan Khan 89 and Pond5 most recently dated 1/10/14 4 5 Exhibit 12 Frequently asked questions 110 6 7 Exhibit 13 Graph (Confidential) 111 8 9 Exhibit 14 Payment information to Mr. Khan 115 10 11 Exhibit 15 ID verification letters 122 12 13 Exhibit 16 Plaintiff's First 124 Interrogatories and Requests for Production of Documents 14 15 Exhibit 17 Audible Magic SDK Implementation 128 Task 16 17 18 19 20 21 22 23 24 25</p>

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SEATTLE, WASHINGTON; March 22, 2016

8:57 a.m.

THOMAS CRARY, witness herein, having been
first duly sworn on oath,
was examined and testified
as follows:

EXAMINATION

BY MR. TOWNSEND:

Q Good morning. Can you please state your name and spell your last name for the record.

A Thomas Crary, last name, C-R-A-R-Y.

Q And you understand that you've been designated to testify as a corporate representative in the matter of Hempton v. Pond5 in the United States District Court for the Western District of Seattle?

A I do.

Q And you understand that today you're designated to testify regarding the facts supporting Pond5's allegation that is entitled to the safe harbor protections under the Digital Millennium Copyright Act and/or 17 U.S.C. Section 512(c); is that right?

A Yes.

Q Have you had your deposition taken before?

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A No.

Q So I'll go through a couple of ground rules. One is if you have any questions about my question or if you're unclear in any way, just feel free to ask and I'll clarify if I can. Do you understand?

A Sure, yes.

Q Okay. That's the other major rule is you need to answer audibly.

A Yes, yes.

Q And then the other rule is to allow me to finish my questions so that they come to an end, and then, usually, you want to wait a beat in case your attorney wants to insert an objection there. But just make sure I finish my questions and you listen to the entirety of the question. And do you understand?

A Yes.

Q And your attorney may object from time to time. Generally, objections are just done for the record for preservation purposes. Under rare circumstances, particularly in the area of privileged communications, he may instruct you not to answer the question. Do you understand?

A Yes.

Q And just to be clear, I'm not interested in -- I respect the attorney-client privilege, and to the

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extent you've had communications with Larry or Curt or any other of the attorneys you've had in this case, those are not the subject -- intended subject of my inquiries.

A Yes.

Q Okay. What's your title at Pond5?

A Chief financial officer.

Q And I'd like to go through a little bit of your background. Did you graduate from college?

A I did.

Q Where did you graduate from?

A Babson College.

Q What year did you graduate?

A 2002.

Q And what was your degree in?

A Bachelor of science in business management, concentration in finance and accounting.

Q And did you obtain any postgraduate education?

A Yeah.

Q Where was that?

A Boston College.

Q And did you get an MBA?

A Masters of accountancy, 2003. Sorry. I'm not supposed to answer until you ask a question.

Q It's helpful in the beginning. Eventually,

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the pacing works better if you stick to the questions, but while we're doing the background, you can probably foresee some of my brilliant questions. So you got a masters of accountancy. That was a one-year program?

A Year and a half.

Q And did you sit for a CPA licensing?

A I did. But I was working during that time as well for most of that year and a half, but, yes, I actually passed the CPA exam before I graduated college.

Q And have you ever been employed as a CPA or worked as a CPA?

A Yes. I worked at KPMG, LLP. It's one of the four big accounting firms.

Q Let's go through your employment history starting in -- after you graduated from college in 2002. Where did you first work after college?

A KPMG.

Q And what is your title there?

A I started as an associate. I worked there ten years in two different departments or two different groups. The first four and a half years I was an auditor working with SEC registered public companies doing assurance and financial statement auditing. For the last six years, I worked in the merger and

2 (Pages 5 to 8)

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EXHIBIT 2

From: Jeanette Hendricks
Sent: Thursday, April 28, 2016 2:11 PM
To: Jamie Telegin; Cindy Heidelberg; Melissa Vizzare; Nick Power; Roger Townsend
Cc: Curt Feig; Kaye Smith; Larry Altenbrun
Subject: RE: Hempton v. Pond5 - Pond5's Third Supplemental Responses to Plaintiff's First Interrogatories and Requests for Production
Attachments: Pond5's Third Supplemental Responses to Plaintiff's First Set of Discovery (00134288).PDF; PON 000531 - 538 (00134276).PDF; Privilege Log for PON 000531-532 (00134287).PDF

Good afternoon,

Attached please find Pond5's Third Supplemental Responses to Plaintiff's First Interrogatories and Requests for Production, corresponding documents, and privilege log. A thumb drive with audio files (PON 000530) is being delivered to Mr. Townsend this afternoon.

If you have any questions, please feel free to contact Larry Altenbrun, Curt Feig, or me.

Very truly yours,

Jeanette Hendricks
Paralegal
Nicoll Black & Feig PLLC
Puget Sound Plaza
1325 Fourth Avenue, Suite 1650
Seattle WA 98101
Telephone: (206) 838-7549
Facsimile: (206) 838-7515
E-mail: jhendricks@nicollblack.com

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Nicoll Black & Feig PLLC

EXHIBIT 3

From: Roger Townsend <rtownsend@bjtlegal.com>
Sent: Thursday, July 14, 2016 9:21 AM
To: Larry Altenbrun
Cc: Curt Feig; nick power; Jeanette Hendricks; Roger Townsend; Cindy Heidelberg
Subject: RE: Pond5 Litigation - Damages

Larry:

I will look at your discovery requests. I'm out the last week of July and first week of August, so keep that in mind in your scheduling.

REDACTED - ER 904



There are two important discovery points which are outstanding and about which we need to meet and confer. Are you available on Friday morning at 10 am?

Specifically, we have the tracks from Ckennedy that you previously provided. However, it appears that the metadata was stripped from the files. Can you advise whether that was done by Pond5? If so, we need versions with the metadata included.

Additionally, please be advised that we need you to identify the individual end users who downloaded the tracks. We held off on discovery on this point in the hopes of settlement, which has passed.

Also, please include Cindy in your emails on this case.

Roger

From: Larry Altenbrun [mailto:laltenbrun@nicollblack.com]
Sent: Wednesday, July 13, 2016 2:30 PM
To: Roger Townsend <rtownsend@bjtlegal.com>
Cc: Curt Feig <cfeig@nicollblack.com>; nick power <nickedpower@gmail.com>; Jeanette Hendricks <jhendricks@nicollblack.com>
Subject: Pond5 Litigation - Damages

Dear Roger:

We will be sending over some written discovery requests today or tomorrow. They include several requests associated with damages. I am writing to see if you might be willing to share some of that information before these discovery requests are due. Providing this information to us now might help facilitate settlement discussions. In particular, during mediation, we were informed that the plaintiff's opening demand for \$1.71 million included statutory damages for 114 tracks that were sold and an award of \$15,000 per track. Can you provide us with any information or documents supporting these numbers? Do you have a list of the 114 tracks? Are there any documents that might help us

EXHIBIT 4

Deposition of 30(b)(6) Thomas Crary - Vol. II

Hempton v. Pond5, Inc., et al.

August 16, 2016



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Hempton v. Pond5, Inc., et al.

30(b)(6) Thomas Crary - Vol. II

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

-----X

GORDON HEMPTON,
Plaintiff,

-against-
POND5, INC., A Delaware Corporation;
and POND5 USER CKENNEDY342, A
Corporation or Individual of Type
Unknown,

Defendants.

CASE NO.: 3:15-CV-05696-DWC
-----X

126 East 56th Street
New York, New York

August 16, 2016
9:10 a.m.

DEPOSITION of 30(b)(6) THOMAS CRARY - VOL. II
before Melissa Gilmore, a Shorthand Reporter and
Notary Public of the State of New York.

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A P P E A R A N C E S: (Cont'd)

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Corporation

1325 Fourth Avenue, Suite 1650

Seattle, Washington 98101

BY: LARRY E. ALTENBRUN, ESQ.

PHONE 206-838-7555

E-MAIL laltenbrun@nicollblack.com

ALSO PRESENT:

GORDON HEMPTON

DAVID S. ROSEN, General Counsel for POND5

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A P P E A R A N C E S:

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----- I N D E X -----

WITNESS	EXAMINATION BY	PAGE
THOMAS CRARY	MR. TOWNSEND	168

----- E X H I B I T S -----

PLAINTIFF'S	DESCRIPTION	FOR I.D.
Exhibit 18	Plaintiff's Fourth	169
	Amended Notice of	
	30(b)(6) Deposition	
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	Nicholas Power and Mike	
	Pace	
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	Hempton, dated August 3,	
	2016	

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1 THOMAS CRARY, called as a
 2 witness, having been duly sworn by a
 3 Notary Public, was examined and testified
 4 as follows:
 5
 6 EXAMINATION BY
 7 MR. TOWNSEND:
 8 Q. Good morning, Mr. Crary.
 9 A. Good morning.
 10 Q. Nice to see you again.
 11 A. Thanks.
 12 Q. You recall the deposition
 13 admonishments that we went through before, last
 14 time. This is a continuation deposition. So I
 15 won't go through those again, other than if you
 16 have any questions about my questions or
 17 they're unclear in any way, please ask me and
 18 I'll clarify them.
 19 Do you understand?
 20 A. Yes.
 21 Q. And then the other key one to
 22 remember is make sure you respond audibly.
 23 You understand?
 24 A. Yes.
 25 Q. And the other one, which is often

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1 hard for people to remember, is make sure I
 2 finish my question before you start your
 3 answer.
 4 You understand?
 5 A. Yes.
 6 Q. And that, you know, unless your
 7 attorney instructs you not to answer, you're to
 8 answer any questions that we provide -- that I
 9 ask.
 10 You understand?
 11 A. Yes.
 12 Q. Okay. You've been designated as the
 13 CR 30(b)(6) deponent for Pond5; is that right?
 14 A. Yes.
 15 (Plaintiff's Exhibit 18, Plaintiff's
 16 Fourth Amended Notice of 30(b)(6)
 17 Deposition, marked for identification.)
 18 Q. And I have handed you what's been
 19 designated as the -- identified as the Fourth
 20 Amended Notice of 30(b)(6) Deposition.
 21 Do you recognize this document?
 22 A. Yes.
 23 Q. And you've been previously deposed
 24 regarding subject matter 25, "The facts
 25 supporting Pond5's allegation that it is

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1 entitled to the safe harbor protections under
 2 the Digital Millennium Copyright Act," and you
 3 previously testified about that; is that right?
 4 A. Yes.
 5 Q. And that you're here today to
 6 testify about the remaining subject matters
 7 designated in this deposition; is that right?
 8 A. Yes.
 9 Q. I would like to start with
 10 identifying and asking you about who are
 11 Pond5's customers. And when I say customers, I
 12 am referring to end users that download files
 13 from the Pond5 system.
 14 Is customers an appropriate term of
 15 art that you use?
 16 A. Sure.
 17 Q. And who would you say are your
 18 largest customers by volume of files?
 19 MR. ALTENBRUN: Objection, beyond
 20 the scope.
 21 A. In terms of the names of them or in
 22 terms of their characteristics?
 23 Q. Well, I would like both, but let's
 24 start with the types of entities that are --
 25 that are your largest customers by volume.

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1 A. Sure. It's what we consider it to
 2 be a long tail business, which means there's a
 3 wide, wide variety of customers that spend
 4 small amounts of money to medium amounts of
 5 money to large amounts of money. Actually,
 6 year to year, it's not very predictable. Our
 7 top customers vary year to year, depending on
 8 what projects they may have going on.
 9 So we have over 150,000 customers
 10 every year. The largest of those, which still
 11 doesn't make up -- you know, so it depends how
 12 want to make it down, but say our top thousand
 13 or so, you know, still don't make up a large
 14 percentage of our revenue. It's still a very,
 15 very small percentage, but -- sorry.
 16 Q. No. Go ahead. I don't want to
 17 interrupt you.
 18 A. But in terms of characteristics,
 19 typically the largest of those customers would
 20 be production companies that produce -- use
 21 media content that they're licensing for -- as
 22 part of a larger project or, you know,
 23 production that they're putting together.
 24 So typically a movie, an
 25 advertisement, TV show, a YouTube production.

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1 which I'm aware of, we have been able to reach
2 a settlement agreement with the infringed
3 parties where they agreed to release the
4 licenses.

5 MR. TOWNSEND: Let me confer with my
6 co-counsel. We will take a short break.
7 (Recess taken.)

8 BY MR. TOWNSEND:

9 **Q. Just to go back with a couple of**
10 **clarification questions over what we talked**
11 **about before.**

12 **Is there anyone in particular -- you**
13 **mentioned the three people responsible for**
14 **curatorial review of sound and audio.**

15 **Is there anyone in particular who**
16 **focuses or specializes or emphasizes in sound**
17 **effects?**

18 A. No.

19 **Q. And you mentioned a two-third,**
20 **one-third distribution. That would just be**
21 **randomly assigned amongst the three?**

22 A. Based on the queue volumes.

23 **Q. How are files assigned to individual**
24 **curators?**

25 A. There is a queue that sorts it by

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1 artist and date of upload, and we basically
2 just work down the list. So whichever is at
3 the top of the list, you pick it.

4 **Q. So it's random --**

5 A. Basically random, yes.

6 **Q. -- as to which of the three?**

7 A. Yes, yes.

8 **Q. And I ask you this as a**
9 **clarification question about you -- as you sit**
10 **here today, are you aware of any customer that**
11 **bought any file from the CKennedy342 user?**

12 MR. ALTENBRUN: Objection, beyond
13 the scope.

14 A. By name?

15 **Q. Yeah.**

16 A. No.

17 **Q. And you've also talked before or you**
18 **testified before regarding the association of**
19 **CKennedy342 with Mr. Hassan Kahn in Pakistan,**
20 **right?**

21 A. Yes.

22 **Q. And you had identified, in your**
23 **review, other Pond5 accounts that were**
24 **associated with Mr. Kahn, right?**

25 A. Potentially.

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1 **Q. And did you conduct any**
2 **investigation of any end user for any of the**
3 **associated accounts that were potentially**
4 **associated with Mr. Kahn?**

5 MR. ALTENBRUN: Object to form, and
6 objection, beyond the scope of this
7 deposition.

8 A. No. Again --

9 **Q. Wait. No, you don't understand the**
10 **question or --**

11 A. No, I understand the question. And
12 no, we did not conduct any analysis of the
13 customers or the license usages that any of the
14 customers would have bought or may have bought.

15 Again, in that case, there was
16 actually no complaint of potential
17 infringement. We surfaced that ourselves and
18 took it down out of abundance of caution.

19 **Q. And you surfaced that before**
20 **CKennedy342 came on your system?**

21 A. Correct.

22 MR. ALTENBRUN: Object to form and
23 beyond the scope.

24 MR. TOWNSEND: Larry, let's pull up
25 the spreadsheet, PON000539.

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1 MR. ALTENBRUN: Sure.

2 MR. TOWNSEND: Let's go off the
3 record for a second.
4 (Discussion off the record.)

5 BY MR. TOWNSEND:

6 **Q. Mr. Crary, you have in front of you**
7 **the spreadsheet, which has been Bates numbered**
8 **PON00539.**

9 **Do you know what this document is?**

10 A. Yes.

11 **Q. What is this?**

12 A. This is a scrape of the metadata
13 that is associated with the files directly from
14 Amazon Web Services where the files reside.

15 **Q. Okay. You're going to have to go**
16 **through a few steps there.**

17 **So which files are included in the**
18 **spreadsheet?**

19 A. I believe it's all of CKennedy's
20 files that are online or were online, I should
21 say. Yeah, 10,243 files.

22 **Q. And when you say online or were**
23 **online, what do you mean by that?**

24 A. These are all the files he uploaded.

25 **Q. Okay. And online, meaning all the**

21 (Pages 244 to 247)

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1 files that were uploaded onto the Pond5 system?

2 A. Yes.

3 Q. Okay. And where do you store them
4 or where are they located?

5 A. Amazon Web Services, AWS for short,
6 is our outsourced hosting company.

7 Q. Being from Seattle, we know them
8 well.

9 Describe the process of -- you said
10 scraping. Describe that process, what you mean
11 by that.

12 A. Files have associated file system
13 metadata that gets tagged onto them at
14 different steps of interactions which different
15 systems. That metadata is generally, you know,
16 left in place, although it can be wiped off by
17 a user pretty easily. It sometimes is
18 automatically wiped off by certain editing
19 systems, from what I understand, but whatever
20 metadata remains stays with the file, and it
21 can be, what we say, scraped off, which
22 basically means use an extraction tool to pull
23 the metadata into a, in this case, CSV file for
24 easy reading.

25 Q. Does the scraping process modify the

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1 metadata in any way?

2 A. Not that I'm aware of.

3 Q. Did the scraping process capture, to
4 your knowledge, all of the available metadata
5 associated with the Ckenedya files?

6 A. I've been doing a fair amount of
7 work on this, more than I would like, so I've
8 learned a lot about it. One thing I've learned
9 since doing this particular exercise is,
10 depending on the extraction tool you use, you
11 sometimes will get different -- different
12 fields that can come up.

13 So I've tried four or five different
14 tools, and I've gotten different results in
15 different -- from the different tools, which is
16 interesting.

17 Q. Can you identify, to the best of
18 your recollection, the tools that you've used?

19 A. I really can't. If you do a Google
20 search for EXIF data or metadata extraction
21 tools, you'll get a bunch of Google results.
22 My developers and myself have tried three or
23 four different versions, mostly just via that
24 Google search approach.

25 The one that we used here is the one

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1 that we have built into the site. This is the
2 same information that you would normally
3 extract from the file upon upload.

4 Q. Built into the site. Are you
5 talking about the Amazon Web Services site
6 or --

7 A. Built into the Pond5 site. So
8 Amazon Web Services hosts our content. Our
9 production site, so where the code sits, is
10 hosted actually by a different company, and
11 that's the extraction tools built into that
12 production site.

13 Q. What company is that?

14 A. Rimmu Hosting, R-I-M-M-U.

15 Q. I'm just going to -- we have done
16 that Google search, and I'm just going to
17 identify a couple and see if they refresh your
18 recollection.

19 A. Sure.

20 Q. And if they don't, they don't.
21 There is an EXIF Data Viewer, did
22 you use that tool?

23 A. I think this is going to be a
24 fruitless exercise. I remember one we did
25 yesterday was Mediaarea.net. That was one we

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1 did yesterday. So I remember that one.

2 Q. And this is information that would
3 be easy to recreate, right? You just don't
4 have it off the top of your head.

5 A. Yeah. I mean, sure. I probably
6 still have a few of them on my computer.

7 Q. Okay. And other than the files that
8 are included in the use of this extraction tool
9 that you used in this exhibit -- or not
10 exhibit, this document that you have produced,
11 what other fields were you able to view that
12 weren't included in this production?

13 MR. ALTENBRUN: Object to form.

14 Q. You understand what I'm asking?
15 What other information did you get from your
16 other searches?

17 A. So it really depends on which files
18 you're looking at, right? So we didn't do this
19 approach -- what we did here is we wrote a
20 script, which was using the site, right? So we
21 did it 10,000 times. If you download one of
22 those things, you got to do it one by one. You
23 have to download the file and look at it,
24 download the file, look at it.

25 So we did a handful just to see what

22 (Pages 248 to 251)

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1 would come up. See if there were differences
2 in the metadata that was being extracted, and
3 there was some differences. You know, as far
4 as I'm concerned, there wasn't a whole lot of
5 useful information that came out of that.
6 There wasn't something that said Hempton, or
7 anything along those lines, that came up in the
8 files we looked at, but there were different
9 fields.

10 Interestingly, they didn't have some
11 of these like creation date and the dating
12 files that you see here, but they did have
13 fields that were sometimes filled in and
14 sometimes not, things like composer, producer,
15 date of recording. Things like that.

16 **Q. Date of reporting?**

17 **A.** Date of recording. And it was just
18 a year. So it was year of recording maybe, but
19 it never had like a date. It was more like a
20 year.

21 **Q. And I've reviewed this file, and**
22 **that's one thing that's stuck out to me, there**
23 **isn't a creation date on this production.**

24 **Did I miss that?**

25 **MR. ALTENBRUN:** When you say this

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1 production, are you referring to document
2 00539?

3 **MR. TOWNSEND:** Yes, thank you for
4 clarifying, Counsel.

5 **A.** That's true. They have modified
6 date, change date and access date. It looks
7 like the three dates that are coming up.

8 Like I said, there was no date on
9 the other version. It was just a year. So it
10 is different.

11 **Q. Say that again?**

12 **A.** It was just a year. So that, you
13 know, like 2014, not month, time stamp kind of
14 stuff.

15 **Q. Okay. Did you review or -- you**
16 **mention whether or not certain extraction tools**
17 **or certain tools for reviewing metadata will**
18 **include the composer, the producer; is that**
19 **right?**

20 **A.** They include fields that can and may
21 have names or dates or whatever, have data in
22 those fields. I'm not saying they had complete
23 fields.

24 **Q. Right. Do you view it as -- well,**
25 **is composer or producer or any -- strike that.**

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1 **Would you agree that metadata may**
2 **include information related to the creator of**
3 **content?**

4 **A.** It may.

5 **Q. And would you agree that it would be**
6 **helpful in your curatorial review process to**
7 **determine whether or not the creator of the**
8 **content was the person who uploaded the**
9 **content?**

10 **MR. ALTENBRUN:** Object to form, and
11 objection, beyond the scope.

12 **A.** I'm sorry. Are those two concepts
13 linked where you look at the metadata and that
14 determines whether they are the creator of the
15 content? Is that what you're suggesting?

16 **Q. I'm suggesting that it would be**
17 **valuable information in your curatorial review**
18 **to determine whether or not the person who**
19 **uploaded the content is the person who's**
20 **identified in the metadata as the creator of**
21 **the content?**

22 **MR. ALTENBRUN:** Objection, calls for
23 speculation and beyond the scope.

24 **A.** So when I've looked at this data, I
25 have yet to see information that is actually

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1 linked to the creators' names. So I've looked
2 at a sample of items from Ckenedy and other
3 users that are on our site, downloaded their
4 raw unmodified files, and I have not seen a
5 whole lot of metadata that would associate the
6 file with a user name -- with a user.

7 **Q. Okay.**

8 **A.** I'm not saying it's never there, but
9 I'm saying the sample I looked at it's rarely,
10 if ever, there.

11 **Q. Okay. But would you agree that it**
12 **would be helpful in your curatorial review to**
13 **determine whether or not the creator of the --**
14 **strike that.**

15 **You mentioned before that certain**
16 **metadata has fields for composers or producer,**
17 **correct?**

18 **A.** It has fields that can have
19 information potentially in them.

20 **Q. So in instances in which there is**
21 **information in those fields, composer or**
22 **producer, would it be helpful in your**
23 **curatorial review to compare the composer or**
24 **producer with the person who's uploaded the**
25 **content?**

23 (Pages 252 to 255)

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1 MR. ALTENBRUN: Objection, lack of
2 foundation, calls for speculation and
3 beyond the scope.

4 A. Yeah, it strikes me as speculative
5 as well because, again, I haven't seen
6 instances where this data is available.

7 Let's assume for a second it is
8 available every single time, just for
9 assumption purposes, why would I be led to
10 believe that that information is any more --
11 the veracity of that information is any more
12 reliable than the uploader itself. Anyone can
13 add their name in metadata to one of these
14 things.

15 Q. Right. But if the person who
16 uploads the content is different than the
17 producer or creator, that would be valuable
18 information to know, wouldn't it?

19 MR. ALTENBRUN: Objection, calls for
20 speculation, lack of foundation, beyond
21 the scope.

22 A. What if -- can I ask you a question?
23 I'm not sure I'm allowed to, but I'm going to
24 try anyway.

25 What if that contributor that is

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1 Q. How broad is that sample?

2 A. Not very broad. I mean, we're
3 talking in the tens.

4 Q. So just to get back to the question
5 because I don't think you've answered it.

6 Would it be helpful information to
7 you do you believe --

8 A. No. Sorry.

9 MR. ALTENBRUN: Let him ask the
10 question.

11 Q. -- in your curatorial review to
12 review who is identified in the metadata as the
13 producer or composer of audio content and
14 compare that information to the person who
15 uploaded the content on your website?

16 MR. ALTENBRUN: Objection, lack of
17 foundation, beyond the scope and calls for
18 speculation.

19 A. Yeah, I really don't think so.
20 Again, you get a series of misleading and false
21 positive answers that would not be helpful to a
22 curator that has two, three seconds to review a
23 sound effects file.

24 Q. And taking aside how much time
25 you're willing to spend on it, that information

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1 uploading it was not the original producer or
2 composer of the information, but they did hold
3 a valid license to be able to sublicense it out
4 through our marketplace? Would that be an
5 acceptable answer to the dilemma you're
6 proposing?

7 MR. ALTENBRUN: You're not allowed
8 to ask questions.

9 A. I'm just trying to figure out what I
10 can do about it. So like in the very seemingly
11 rare case where I have ever seen this
12 information that has --

13 Q. You don't review the content -- you
14 don't review that information?

15 A. We don't review that as part of our
16 curatorial step.

17 Q. So you don't really know how often
18 it occurs, right?

19 A. Only because I've sampled it at the
20 request of you guys. So trying to figure out
21 exactly what is there, I've now done a sample
22 of both Ckenedy's work and other artists as
23 well to see what would be there in whatever
24 circumstances, and what I found is it's very
25 rarely anything there that's useful.

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1 could be valuable, couldn't it?

2 MR. ALTENBRUN: Objection, asked and
3 answered. Same objections as last
4 question.

5 A. I have not come across a situation
6 in my review where the information was helpful
7 at all in determining who the copyright holder
8 of the information legitimately was.

9 Q. Right. We know the scope of your
10 review to date, but it surprises me that that
11 wouldn't be relevant if there is data about the
12 owner of content and you're in the process of
13 doing a curatorial review that you wouldn't
14 want to investigate that data and determine
15 what that is and that that could be done
16 through an automated process.

17 MR. ALTENBRUN: That's not a
18 question.

19 MR. ROSEN: You didn't say that,
20 right?

21 MR. ALTENBRUN: That's not a
22 question. There's no response needed.
23 Counsel let's move on, please.

24 MR. TOWNSEND: I'm not moving on.

25 MR. ALTENBRUN: State a question

24 (Pages 256 to 259)

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1 instead of a comment.
 2 BY MR. TOWNSEND:
 3 Q. So is it your position that it is
 4 irrelevant whether or not the composer or
 5 producer of content identified in metadata on
 6 files is different or the same as the entity
 7 that uploaded the content?
 8 MR. ALTENBRUN: Objection, beyond
 9 the scope, lack of foundation, calls for
 10 speculation and object to form.
 11 A. Would it help if I gave an example
 12 from one of my samples?
 13 Q. Well, answer the question I think.
 14 A. Maybe I can answer the question in
 15 the form of my example.
 16 So Mr. Doug Price, who is -- who I
 17 think Mr. Hempton knows and was the -- was the
 18 subject of this letter here or started this
 19 correspondence between Mr. Hempton and Pond5,
 20 is one of our contributors, Pro Sound Effects.
 21 They contribute lots of content to our site.
 22 I looked at some of their stuff
 23 through the same EXIF extraction tool
 24 yesterday. Now, nowhere on any of the items
 25 that I sampled through Pro Sound Effects was

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1 the name Pro Sound Effects found in the
 2 metadata. I saw various other names, including
 3 Bridge Broadcasting Company, BBC.
 4 Am I, as a curator, to then assume
 5 that he doesn't hold the copyright or the
 6 ability to license that to one of our
 7 customers? I'm not allowed to ask you a
 8 question, so I'll will keep going.
 9 My position is there is very rarely
 10 that data in there ever that would even be
 11 useful. And in the event that it is, it can
 12 send you on a wild goose chase.
 13 And taking a step back, where I do
 14 have to get through 3,000 sound effects a day,
 15 and I only have two, three seconds to review,
 16 and this process is not automated, it's an
 17 extraction tool where you have to, you know,
 18 download the file, import into this tool and do
 19 the metadata, and then make a conclusion on it.
 20 I don't think that's reasonable or helpful.
 21 Q. And do you think it's an indicator
 22 of the proprietariness of content whether or
 23 not metadata has been stripped from that
 24 content?
 25 MR. ALTENBRUN: Objection, lack of

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1 foundation. Object to form and beyond the
 2 scope.
 3 A. No, again, based on my sampling,
 4 there were lots of -- lots of -- lots of
 5 examples where there was very little or no
 6 metadata still associated with the files that
 7 you would normally expect to be there if it was
 8 direct from a composer or whatever you're
 9 suggesting.
 10 Q. And are there any -- I mean, you
 11 haven't conducted much review of this, but is
 12 it possible that metadata would contain, for
 13 example, a copyright registration number?
 14 MR. ALTENBRUN: Objection, beyond
 15 the scope and lack of foundation.
 16 A. I have not come across any instance
 17 in my, albeit, limited review of a copyright
 18 number of any kind.
 19 Q. And Pond5 doesn't review for that
 20 information, does it?
 21 A. No.
 22 Q. Does Pond5 modify metadata on the
 23 files that are uploaded onto its website as a
 24 matter of practice?
 25 A. No.

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1 Q. Does it add any metadata?
 2 MR. ALTENBRUN: Objection, lack of
 3 foundation.
 4 A. Not to the file itself. We don't
 5 add any metadata to the file itself.
 6 Q. What distinction are you making?
 7 What metadata do you add?
 8 A. We store data in our database.
 9 That's metadata that's associated with the file
 10 itself, but the actual file is stored in its
 11 original unaltered form from what we have
 12 gotten.
 13 Amazon Web Services is like a hard
 14 drive. You make a copy when it comes from the
 15 contributor, and it gets onto our site. That
 16 copy sits there forever in its unaltered form,
 17 and that copy is what's available for download
 18 by our customers.
 19 Q. Do you review that metadata as part
 20 of your curatorial review process at all?
 21 A. No.
 22 Q. And did you review -- let me go
 23 down.
 24 If you look on 539 and just search
 25 for QP, for Quiet Planet. What file do you see

25 (Pages 260 to 263)

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1 there?

2 A. The first file is on line 9,787, and
3 it looks like it's QP050473, surf rock, jetty
4 splash.

5 Q. And are you aware, as you sit here
6 today, that that QP identifier is a product
7 identifier for Quiet Planet content?

8 A. I'm seeing the QP, and I'm now
9 suspicious.

10 Q. I will represent to you if you do a
11 Google search on those QP numbers that you end
12 up at the Quiet Planet website.

13 A. Okay.

14 Q. Is that a process that Pond5 has
15 undertaken at any time, meaning Google
16 searching the metadata fields for who might be
17 the owner of the CKennedy content?

18 MR. ALTENBRUN: Objection, beyond
19 the scope and lack of foundation.

20 A. I have been to Mr. Hempton's
21 Soundtracker website. I haven't looked at the
22 file extensions that were included in his
23 files.

24 Q. Okay. At any time did Pond5 do a
25 Google search on the file names as uploaded and

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1 identified by CKennedy342 at all?

2 MR. ALTENBRUN: Objection, beyond
3 the scope and calls for speculation.

4 A. So I take this QP number and then --

5 Q. Or take surf rock, jetty splashy.

6 MR. ALTENBRUN: Same objections.

7 A. No.

8 Q. Okay. Have you conducted any -- has
9 Pond5 conducted any investigation into the fact
10 that the file names, as uploaded by
11 CKennedy342, are identical to the file names
12 used by Mr. Hempton to identify his content?

13 A. No. I didn't -- this is the first
14 I've seen this link. So I guess I didn't
15 scroll all the way through the 9,787 lines to
16 get to this number.

17 Q. And did you do any Google searching
18 on just the file names as identified by
19 Mr. Kahn operating as CKennedy342?

20 A. Only after the fact.

21 Q. And what did you determine when you
22 did that?

23 A. I think I found at least one link to
24 a YouTube account for -- I can't remember the
25 name of the site. I don't remember, but there

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1 was one like sort of exact file name. In fact,
2 it was the longest clip. There was like a
3 30-minute clip on the site. It was linked to
4 some YouTube account. It wasn't clear who the
5 owner was of the site either. It looked like
6 it was some sort of free sound effects that
7 they were providing under fair use.

8 Q. Okay. And I think -- I'm not sure
9 fair use is the term you want to use there.

10 A. I think that's what they were
11 saying.

12 Q. But -- so I'll represent to you that
13 in our review of the names of the CKennedy
14 files, the thing that has become apparent is
15 the names of the CKennedy files are identical
16 to the CKennedy -- the files used by
17 Mr. Hempton.

18 And has Pond5, to your knowledge,
19 conducted any analysis comparing the file names
20 used by CKennedy and the file names used by
21 Mr. Hempton?

22 MR. ALTENBRUN: Objection, beyond
23 the scope and lack of foundation.

24 A. So we have been talking for almost a
25 year now. You know, I think the first

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1 communication is here in front of us in May of
2 2015, where it was alleged that there were
3 thousands of Mr. Hempton's files online. This
4 is the first instance where there was ever a
5 link, which was never explained to us how we
6 could even determine where these files would
7 reside after a year.

8 So no, as I sit here today, this is
9 the first time someone has represented to me
10 that this QP designation is a link that we can
11 and should make to our files.

12 Q. Right. And the question I'm asking
13 now is about the fact that, related to my
14 representation that the file names as used by
15 CKennedy, are the same as the file names as
16 used by Mr. Hempton.

17 So that would just be a Google
18 search of, you know, for example, you know,
19 impact cardboard box hard, and I take that as a
20 random example.

21 So the question is, at any time did
22 Pond5 do a Google search on the names used by
23 CKennedy342?

24 A. So I go through the 10,000 tracks,
25 pick out one, like impact cardboard box, and do

26 (Pages 264 to 267)

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1 a Google search on that?

2 Q. Yes.

3 A. No.

4 Q. I have one more line of questioning,
5 and I want to follow up on some comments from
6 my client, but let me go through the evaluation
7 license issue and then take a break, and we
8 will wrap up.

9 So I wanted to go back over the
10 issue of the -- or the treatment of evaluation
11 licenses by Pond5.

12 Just for the record, can you
13 describe how evaluation files are download and
14 made available to end users?

15 MR. ALTENBRUN: Objection, beyond
16 the scope and object to form.

17 A. So I think what you're referring to
18 is the previews that are available through the
19 site?

20 Q. Right.

21 A. So customers that are previewing
22 content of any media type, you know, in this
23 case we're talking about a sound effect, can go
24 onto the site, search for the search term
25 they're interested in finding, and then preview

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1 a compressed version of the file with audio
2 watermarking attached to it.

3 Q. So two questions. One is what is
4 the audio watermark that's put on there, and
5 has that changed in the last year?

6 MR. ALTENBRUN: Objection, beyond
7 the scope.

8 A. I think we did change it a few
9 months ago. It used to say, "Pond5.com." Now,
10 it just says, "Pond5."

11 Q. Let the record reflect that was done
12 in an English accent.

13 A. Actually it was Dani DiCiccio.

14 Q. And you mentioned that they're
15 compressed files.

16 Has that always been the case?

17 A. Yes.

18 Q. And describe what you mean by
19 compressed files.

20 MR. ALTENBRUN: Objection, beyond
21 the scope.

22 A. So the bit rate of a full
23 uncompressed wave file is 1.4-megabytes per
24 second, megabits per second, and these files
25 are compressed to 120 kilobits to 192,

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1 somewhere in that range, depending on the -- I
2 don't even know what actually, but how they're
3 compressed for both, you know, speed of loading
4 as well as to prevent piracy.

5 Q. Do you track the user identity of
6 anyone who's downloaded a -- well, strike that.

7 When you download a sample, it's an
8 evaluation license or sample version, right?

9 A. Yeah.

10 Q. Is that downloaded onto a hard drive
11 so the user can use it and modify it?

12 MR. ALTENBRUN: Objection, beyond
13 the scope and object to form.

14 A. No. No. To my knowledge, I don't
15 think it -- at least it wouldn't be easily done
16 where you could actually download it to your
17 computer. It's a preview that plays through
18 the browser.

19 It wouldn't surprise me if there's
20 some particularly engineering people out there
21 that have a way of getting such evaluation
22 licenses to their computer. I, you know,
23 personally wouldn't know how to do it.

24 Q. And do you track the user identity
25 that are subject to the evaluation license?

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1 MR. ALTENBRUN: Objection, beyond
2 the scope.

3 A. We endeavor to track it for, you
4 know, business intelligence purposes. We have
5 had some spotty data on it. You know, the
6 tracking mechanisms have to be very
7 consistently applied to all the different
8 items.

9 So we endeavor to track it, and it's
10 one of the areas we're trying to, you know, be
11 able to track consistently.

12 Q. Do you know whether anyone has -- or
13 anyone at any time has entered into an
14 evaluation license for any of the CKennedy342
15 content?

16 MR. ALTENBRUN: Objection, beyond
17 the scope.

18 A. I have not looked at the data
19 associated with these files.

20 Q. Okay. And so you don't know if
21 that's -- that data exists; is that right?

22 MR. ALTENBRUN: Objection, beyond
23 the scope.

24 A. I don't know if it exists.

25 Q. And just looking at the Pond5

27 (Pages 268 to 271)